

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER DENYING DEFENDANT
WALGREENS' MOTION TO DIS-
MISS

This document relates to:

Dunham v. SmithKline Beecham
Corporation, C05-159

This matter comes before the court on a motion filed by defendant Walgreen Company, seeking dismissal of Count I(C) and Count II(C) of plaintiff Claude Dunham's complaint against it. Having reviewed the parties' briefs, the court finds and rules as follows.

Walgreens first seeks dismissal of Count I(C), for strict liability. Walgreens' sole grounds for dismissal is that "under Florida law [] the Doctrine of Strict Liability is not a recognized cause of action against a pharmacist or pharmacy that merely fills or sells a lawfully presented prescription." Defendant's Brief at 3, citing *McLeod v. W.S. Merrell Company*, 174 So.2d 736 (Fla. 1965).

The fatal flaw of defendant's argument is obvious; the medications plaintiff alleges to have caused his injuries were

1 purchased over the counter, not by prescription. The cases
2 defendant cites are unequivocally limited to situations involving
3 prescription drugs:

4 [The court] should examine the instant record within a
5 narrow orbit circumscribed by the salient facts, which
6 are: (1) an action against a retail druggist; (2) the
7 drug was available only to a limited segment of the
8 public who could present a medical doctor's prescrip-
9 tion therefor; (3) the prescription was filled pre-
cisely in accordance with its directions, and even
then, in the manufacturer's original packet; (4) there
was no adulteration; (5) both the patient-purchaser and
the retail druggist relied upon the doctor's prescrip-
tion, rather than upon the druggist's judgment.

10 *McLeod*, at 738. Defendant glosses over this highly salient
11 distinction between *McLeod* and Dunham's claims, and makes no
12 argument, let alone a persuasive one, that the reasoning of
13 *McLeod* should be applied here.

14 Defendant commits the same error with respect to its motion
15 to dismiss the negligence claim, Count II(C) of plaintiff's
16 complaint, arguing that "the sole duty owed by a pharmacy to its
17 customers is to properly fill all lawfully presently [sic]
18 prescriptions." Defendant's Brief at 5. Walgreens again cites
19 case law involving only prescription medications. These cases, as
20 discussed above, are clearly inapposite, and defendant makes no
21 effort to argue their applicability to the case at hand.

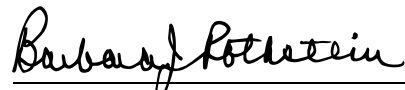
22 In the alternative, Walgreens seeks dismissal of Counts I(C)
23 and II(C) on statute of limitations grounds, asserting without
24 any legal support whatsoever that the claims sound in profes-
25 sional malpractice, which enjoys a two-year limitations period
26 under Florida law. Plaintiff responds that its claims for negli-

1 gence and strict liability are lodged against Walgreens as
2 advertiser, marketer, promoter, seller and distributor of the
3 allegedly offending over-the-counter medications, not as a
4 pharmacy filling a prescription. Under Florida law, the statute
5 of limitations for claims for product liability and negligence is
6 four years.

7 Absent any evidence or legal support that these claims
8 relating to over-the-counter medications should be treated as
9 professional malpractice claims, the court finds that the product
10 liability and negligence statutes of limitations should apply.
11 There is no dispute that plaintiff's claims were filed within
12 this period.

13 For the foregoing reasons, the court hereby DENIES defendant
14 Walgreens' motion to dismiss in its entirety.

15 DATED at Seattle, Washington this 26th day of April, 2005.

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18 BARBARA JACOBS ROTHSTEIN
19 UNITED STATES DISTRICT JUDGE
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